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NO. 94-2034

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

EMPRESA NACIONAL SIDERURGICA, S.A.,
Petitioner,

v.

JERRY YOUNG,
Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA FOURTH CIRCUIT
COURT OF APPEAL

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

There is no escaping the conclusion that the Louisiana Fourth Circuit Court of Appeal ignored the intent of this Court's earlier Writ, and wrote an amended opinion that was simply result oriented. Because the Fourth Circuit's opinion is badly reasoned, Respondents' efforts to defend it stretch legal logic, and in fact highlight the reasons why this case is suitable for a "double remand".

In their initial opinion, the Fourth Circuit found a breach of the first *Scindia* duty, the turnover duty. The "open and obvious" defense was inapplicable to this duty, they said. However, this Court saw fit to vacate the judgment, and remand the case for consideration in light of *Howlett*, a case dealing with the open and obvious defense. In order to achieve the desired result, the Fourth Circuit, in their amended opinion, again found that the open and obvious defense applied only to the corollary to the turnover duty, *i.e.* the duty to warn, and not to the turnover duty itself. In what amounts to an avoidance maneuver, they absolved the vessel owner, and proceeded to find liability on the party of ENSIDESA as time-charterer (sic) and loading stevedore. This was the cue for respondents to jump to the defense of the Fourth Circuit and argue that ENSIDESA was found liable under a totally separate legal theory, and that this theory of liability remained unaffected throughout the appeals process. This argument is as full of holes as swiss cheese.

Firstly, as to the argument that there was a failure to object to a jury charge, there was in fact *no* "loading stevedore" charge. There were only *Scindia* charges, the first being the "reasonable

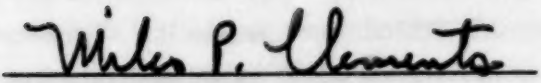
care under the circumstances" charge relating to the turnover duty. The jury interrogatories on the other hand contained only a single question relating to ENSIDESA's liability "as charterer of the vessel and/or loading stevedore" (thus leaving purely to speculation on just what basis the jury thought it was imposing liability). Given the actual instructions, the basis of the jury's finding was a breach of the *Scindia* duties. This Court expressly dealt with the *Scindia* duties in *Howlett*. The judgment in this case was vacated specifically on that basis. The failure to object to a jury charge or some such procedural issue is a red herring. What actually happened is that the Fourth Circuit misinterpreted the *Scindia* duties in its first opinion, and compounded the error in its second by refusing to admit that the open and obvious defense applies to both the turnover duty and the duty to warn. Then, in the avoidance maneuver, they simply said that ENSIDESA was liable for creating a "dangerous condition" in the stow. This is just another way of describing a breach of the turnover duty, and nowhere does the opinion refer to any failure to object to any jury charge, or expressly base its finding of liability on the general maritime law. The Fourth Circuit used a *Scindia* analysis, pure and simple, faulty though it may be, and it is incorrect to argue that the court found ENSIDESA liable on a totally distinct cause of action, and that the jury was charged on this cause of action, without challenge.

The incorrect premise upon which the above procedural argument is based is then used to bootstrap a "law of the case" argument. With respect, the law of the case is what *this* Court says it is. To argue that some "finding" was acceded to by ENSIDESA, is missing the point. This Court vacated the Fourth Circuit's

judgment. To their credit the Fourth Circuit understood at least that much, and nowhere in their amended opinion is there any reference to procedural issues regarding jury charges or to any particular finding of theirs supposedly based on the general maritime law that they determined was now the law of the case. Most importantly, they absolved a co-defendant and *increased* the liability of ENSIDESA based on a *Scindia* analysis, a finding which ENSIDESA may and does appeal. There was no independent basis for liability analyzed and expressed as a separate legal theory. Nowhere in the opinion do the words "general maritime law" appear. And furthermore, how can an increase in percentage and, consequently, monetary damages suddenly become unappealable?

Respondents' reliance on *Couch* is likewise illustrative of their faulty logic, and actually supports ENSIDESA's position. In that case, the Federal Fifth Circuit decided that there was no cause of action against the loading stevedore under the *Scindia* duties at all, as interpreted in *Howlett*, which is precisely what ENSIDESA argues here. The Fifth Circuit may well have found a cause of action framed in terms of general negligence principles, but that is not the basis of the liability finding in our case. The difference is that the Louisiana Fourth Circuit has found ENSIDESA liable based on a *Scindia* analysis, as did the jury, a finding disapproved of by this Court. That is exactly what is wrong with the judgment in this case, and why the case should be remanded again.

Respectfully submitted,



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